Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1372

INTERSTATE MOTOR FREIGHT SYSTEM,
Petitioner,

v.

THE UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Interstate Motor Freight System (Interstate) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the cause on December 28, 1977.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor the Decision and Order of the Interstate Commerce Commis-

sion are reported. They, together with the Initial Decision of the Administrative Law Judge, are printed in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 2350.

QUESTION PRESENTED

Whether the Interstate Commerce Commission may refuse to grant an application by a motor carrier to recast its authority, where the Commission has encouraged the filing of such applications, has invariably (save in exceptional circumstances not present here) granted them, and did not explain its reasons for departing from its consistent precedents.

STATUTE INVOLVED

1. Section 204(b) of the Interstate Commerce Act (49 U.S.C. § 304(b)) provides in part:

> The Commission may from time to time establish just and reasonable classifications . . . of groups of carriers included in the term "common carrier by motor vehicle", . . . as the special nature of the services performed by such carriers . . . shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of [part II of the Act], to be observed by the carriers . . . so classified or grouped, as the Commission deems necessary or desirable in the public interest.

2. Section 206(a)(1) of the Act (49 U.S.C. § 306(a)(1)) provides in part:

> . . . no common carrier by motor vehicle subject to the provisions of [part II of the Act] shall engage

> in any interstate or foreign operation on any public highway . . . unless there is in force with respect to such a carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . .

3. Section 207(a) of the Act (49 U.S.C. § 307(a)) provides in part:

> . . . a certificate shall be issued to any qualified applicant therefor . . . if it is found that . . . the proposed service to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . .

STATEMENT OF THE CASE

The Interstate Commerce Commission denied, and the Court of Appeals affirmed the denial of, an application by Petitioner to "convert" an existing motor common carrier authorization permitting operations over *irregular routes* between St. Louis and Kansas City, on the one hand, and all points in Arkansas and Oklahoma, on the other. A grant of the application would have permitted operations over eight specified *regular routes* between St. Louis and Kansas City, on the one hand, and Oklahoma City, Little Rock and Jonesboro, on the other.

The Commission has long distinguished between "regular-route" motor carriers which operate over specified routes between designated points (as between Washington and Baltimore over Interstate 95) and "irregular-route" carriers which operate over routes of their choice between geographic areas (as between all points in Maryland and all points in Virginia). The Commission has also long recognized and repeated that "the difference between the operations of an irregular-route carrier . . . favored with a consistent and substantial volume of traffic and those of regular-route carriers is hardly discernible."

Ship-by-Truck v. *Crouch Bros., Inc.*, 93 M.C.C. 89, 96 (1963); *Alabam Freight Lines* v. *Arizona Exp. Inc.*, 66 M.C.C. 567, 572 (1956). So tenuous has the distinction become, particularly with the development of the Interstate Highway System creating obvious preferred routes between major cities, that the Commission seriously entertained its abolishment. *Motor Common Carriers of Property-Routes and Service*, 88 M.C.C. 415 (1961). The determination to retain the regular and irregular route classification was importantly reached in the view it was no great burden on irregular-route carriers. This was said to be (*Id.* p. 432):

> ". . . borne out by an examination of our past decisions in which conversion to regular routes was authorized. Where a carrier, upon noting a tendency of its operations to fall into a regular-route pattern, has filed an application seeking conversion of its authority, its application has usually been granted, assuming, of course, that the operations have actually taken on a regular-route character. (Citations) The only recent denial of such an application to come to our attention is *Overnite Transp. Co. Ext.—Conversion to Regular Routes*, 79 M.C.C. 231, in which it was found the carrier involved was not willing to surrender its existing authority . . . ."

Prior to 1968, the principal difference in the operations of the two classes of carriers probably derived from the restriction upon irregular-route carriers, preventing their transporting other than truckload lots. In that year, the Commission both removed the restriction and admonished irregular-route carriers that they could not deliberately now confine themselves to the generally more lucrative truckload traffic but would have to take all necessary steps to provide the new less-truck-load service opened to them. *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455. That decision had a severe impact upon Southwest

Freight Lines, Inc. (Southwest) and very directly generated the present case.

Southwest had authority to operate as an irregular-route carrier between St. Louis and Kansas City, on the one hand, and all points in Arkansas and Oklahoma (and other states not pertinent here), on the other. LTL service is virtually impossible unless the carrier has terminals where traffic can be assembled or distributed, and the necessary pickup and delivery equipment to assemble or distribute such traffic. Southwest, to continue as a motor carrier, would have been compelled to recast its operations, add personnel, and make a substantial additional investment in necessary properties. Its president testified that, required either to expand or sell, Southwest elected to sell.

It was Petitioner who in January 1970 acquired Southwest's operating authority. The Commission's approving decision recognized that these rights would in the future support and require operations by Interstate quite different from those Southwest conducted in the past. See *Interstate Motor Freight System—Purchase—Southwest Freight Lines, Inc. and Direct Transports, Inc.*, No. MC-F-10174 (not reported).

Interstate is a large motor common carrier operating primarily over regular routes between most of the cities in the northeast quadrant of the United States, including regular routes to and from both St. Louis and Kansas City. As of late 1973 it operated 87 terminals in the United States, over 3,000 pieces of highway equipment and 2100 pieces of city equipment.

Regular shippers who patronized Interstate in the East, as they became aware of its newly acquired rights, tendered it more and more traffic, most of it LTL, to Arkansas and Oklahoma. At first Interstate interlined such traffic at St. Louis for delivery in the two states by other

motor carriers. Since interlining is less efficient, due to delays, and deprived Interstate of revenues, it opened six terminals in the two states over the eighteen months after September 1970. As terminals opened, and Interstate enhanced its service abilities, more inbound traffic was tendered. To balance traffic and to utilize fully terminal managers, they were encouraged to develop outbound traffic. Shipper demand tended toward regularity, and shipper awareness of regularity bred more traffic—and increased regularity. Interstate's local management conformed its operations to the pattern of traffic, providing daily service over the best available routes where experience showed that the rendition of good service required it.

In the spring of 1972, Interstate's headquarters officials, alerted to what was happening, ran computer printouts which showed an emergent pattern of regularity. There followed the application to convert irregular route authority to regular route authority over eight specified routes.

The Commission, substantially adopting the recommendations of the Administrative Law Judge, never gainsaid but affirmatively found the essential correctness of the facts sketched above. Its refusal to approve the application was based wholly on characterizing and perjorative language for which there was no support either in the record or its own objective and concrete findings. It determined that Interstate had "*deliberately* utilized its invoked irregular route authority in regular-route service by *encouraging* the procurement of less-than-truckload (LTL) traffic through an *aggressive solicitation campaign*, and by adapting its operations to *promote* the use of fixed routes and scheduled service characteristic of regular-route operations" (emphasis added).

The Commission's decision was an abrupt, complete and unexplained departure from its consistent pattern of granting similar applications. It had virtually represented

to carriers holding such irregular-route authorizations as Interstate sought to convert that they would encounter no problems if shipper demand had altered the nature of operations to regular-route ones. The brief Court of Appeals affirming opinion partially recognized as much by acidulously noting the Commission's failure to deal with precedents on which Interstate particularly relied.

REASONS FOR GRANTING THE WRIT

The degree to which the activities of the citizenry are affected by determinations of administrative agencies is a growth phenomenon almost without parallel. Considering the immense impact which the determinations of administrative agencies have, it is not sufficient for this Court merely to lay down general principles governing them from time to time. It must, on proper occasions, illustrate the application of these principles in concrete cases.

The present case is such an occasion. Here, the Commission has followed a consistent, self-emphasized policy of granting applications of the type denied. It justified retaining the suspect classification of "irregular-route carriers", on the ground that those whose operating rights were so classed would bear no great burden. Where they were so favored by shippers as to develop regular traffic patterns, the Commission announced it would continue its policy of granting conversion applications.

When the Commission approved Interstate's acquisition of Southwest's rights (which it did by adopting without modification its Administrative Law Judge's Report), it explicitly recognized that the nature of the operations would change under Interstate. The Judge, after noting Southwest's unwillingness to undertake the expansion required to fulfill its new obligation to render LTL traffic, remarked approvingly that "it would be the intent and purpose of Interstate, if the instant application were ap-

proved and consummated, to generate and develop less than truckload traffic between its present territory and the Southwest . . . territory." But, when Interstate did make the investment in terminals and employ personnel necessary to do just that and its operations evolved into regularity, the Commission characterized its unavoidable actions as "deliberate" ones undertaken to force regularity.

The Commission thus refused to do what it has consistently done for all others similarly situated—viz., grant conversion applications where the volume of traffic tendered by shippers has converted irregular into regular-route operations. The Commission has, in effect, penalized Interstate precisely because it rendered service so good as to attract traffic of such a volume as to cause its operations to evolve into regularity.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 1978

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1977

No. 76-1521

INTERSTATE MOTOR FREIGHT SYSTEM,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

SUPERIOR FORWARDING COMPANY, INC., ET AL.

PETITION FOR REVIEW OF AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION

Before: BAZELON, Chief Judge, WRIGHT and ROBB,
Circuit Judges

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the Interstate Commerce Commission under review herein is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

This is a petition for review of an order of the Interstate Commerce Commission. The facts are not in dispute. The only issue is whether the Commission (Division 1) acted arbitrarily and capriciously in denying the application of Interstate Motor Freight System (Interstate) to convert a portion of its existing irregular route authority in Arkansas and Oklahoma to regular route authority.

The Commission's principal reason for denying the application was that Interstate had deliberately transformed the service in question into regular route operations through "aggressive solicitation" and "use of fixed routes and scheduled service characteristic of regular route operations." J.A. 138. Interstate contends that on the facts of this case this conclusion constitutes an unexplained departure from established Commission policy.

We have carefully examined the authorities cited by Interstate in support of this contention and find them wholly unpersuasive. Not only has the Commission steadfastly adhered to the distinction between regular and irregular route authority,[1] it has consistently stated that it will not sanction conversion from irregular to regular route authority where the character of the service has been intentionally transformed by the carrier.[2] Given that

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[1] *E.g.*, Brown Transport Corp., Extension—Florida Points, 121 M.C.C. 521, 535-36 (1975); Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415, 433 (1961); Transportation Activities, Brady Transfer & Storage Co., 47 M.C.C. 23 (1947), *aff'd* Brady Transfer & Storage Co. v. United States, 80 F. Supp. 110 (S.D. Ia.), *aff'd*, 335 U.S. 875 (1948).

[2] *E.g.*, Tidewater Express Lines, Inc., Conversion Application, 103 M.C.C. 694, 697 (1966); Hart Motor Express, Inc. v. Midwest Motor Express, Inc., 92 M.C.C. 558, 563-64 (1963); Ship-By-Truck Co. v. Crouch Bros., Inc., 93 M.C.C. 89, 95-96 (1963); Alabam Freight Lines v. Arizona Express, Inc., 66 M.C.C. 567, 572 (1956).

deliberate or intentional transformation is an established ground for denial of a conversion application, we think the Commission could properly infer from the facts of this case that Interstate deliberately or intentionally transformed the service in question into regular route operations.

We are constrained to add that the Commission's performance in this case leaves something to be desired. The principal decision relied upon by Interstate, *Hart Motor Express, Inc.* v. *Midwest Motor Express, Inc.*, 92 M.C.C. 558 (1963), was not cited in the Commission's order, and was distinguished by the Administrative Law Judge on what appears to be a questionable ground.[3] *Midwest Motor* is not mentioned by name in the Commission's brief, but is brushed aside along with the other decisions cited by Interstate with the remark that "Interstate has cited no instance in which, on similar or even closely analogous facts, the Commission has treated a carrier differently." Comm. Br. at 19. Only at oral argument, in response to questioning from the bench, did counsel for the Commission offer satisfactory grounds for distinguishing *Midwest Motor* from the present case. Needless to say, both this court and Interstate are entitled to expect more forthright decisionmaking and appellate advocacy from the Commission.

[3] The ALJ suggested that Interstate, unlike Midwest Motor, did not show sufficient diligence since it did not seek conversion until a formal ICC investigation seemed likely. J.A. 120-21. The Commission's decision in *Midwest Motor*, however, indicates that Midwest Motor did not apply for conversion until a complaint had been filed against it by a competing carrier. 92 M.C.C. at 559.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 7th day of April 1976.

No. MC-35628 (Sub-No. 343)[1]

INTERSTATE MOTOR FREIGHT SYSTEM
CONVERSION APPLICATION

(Grand Rapids, Mich.)

Upon consideration of the application, as amended, and the record in the above-entitled proceeding, including the initial decision of the Administrative Law Judge, the exceptions filed by applicant, and the replies filed thereto by protestants (1) Be Mac Transport Co., Inc., Jones Truck Lines, Inc., Midway Motor Freight, and Superior Forwarding Company, Inc., jointly, (2) Atlas Transit, Inc., and Freightways Express, Inc., jointly, and (3) Garrison Motor Freight, Inc.;

It appearing, That the Administrative Law Judge recommended in the conversion proceeding that the authority sought for the transportation of general commodities, with exceptions, over described regular-routes in Arkansas, Kansas, Missouri, and Oklahoma be denied; and in the embraced investigation proceeding ordered respondent to cease and desist from the regular-route operations it was found to be conducting without appropriate operating authority from the Interstate Commerce Commission, until such authority has been obtained;

It further appearing, That applicant/respondent contends, *inter alia*, that the Administrative Law Judge im-

[1] Embraces No. MC-C-8089, Interstate Motor Freight System, Investigation and Revocation of Certificates.

properly excluded certain evidence proferred by an officer of applicant on the ground that the witness lacked first-hand knowledge and was incompetent to offer evidence of applicant's operation as it existed before he assumed his present office; that a witness' knowledge of the matters attested to does not have to be acquired "first-hand" but may be acquired through the normal operation of the involved business (*Jenkins Truck Line, Inc., Extension—Decatur, Ga.*, 100 M.C.C. 625, 628 (1966); and *Dibble Contract Carrier Application*, 92 M.C.C. 610, 612 (1963)); that the witness here was required to familiarize himself with applicant's existing operations in order to perform properly his duties as regional vice-president; that the length of the witness's experience in the territory here involved goes to the weight to be accorded his testimony rather than to his competence; and that the involved evidence of applicant's operations as it existed before the witness assumed office should be considered herein, but that otherwise inasmuch as the witness conceded that he was unfamiliar with the routes sought in the application, all evidence concerning the routes sought proferred in the written verified statement of Joseph L. Wilkes as delineated herein properly was stricken for the reason that the witness lacks knowledge of the matters attested to:

(A) Page 5, line 14, beginning with the words "In line with . . ." and concluding with the words ". . . to St. Louis." on line 16,

(B) the last paragraph on Page 6,

(C) the second paragraph on Page 8,

(D) the second full paragraph on Page 9, and

(E) Page 9, line 19, beginning with the words "We have requested . . ." and concluding with the words ". . . metropolitan area." on line 21.

It further appearing, That the admissible evidence of record demonstrates that respondent herein deliberately utilized its involved irregular route authority in regular-route service by encouraging the procurement of less-than-truckload (LTL) traffic through an aggressive solicitation campaign, and by adapting its operations to promote the use of fixed routes and scheduled service characteristic of regular-route operations; that the evidence does not show sufficiently the routes traversed in transporting the involved traffic such that it can be determined over which regular-routes to authorize service; that even if the authority sought were to be construed as conferring only a single operating right, the regular-routes sought and irregular routes proposed to be converted would not merge or restrict the irregular route service, territorially or otherwise, which applicant may offer (see *Geo. F. Alger Co.—Purchase—Kirk Transp. Co.*, 38 M.C.C. 342, 345 (1942); and that applicant's belated suggestion to restrict the involved irregular route authority against the transportation of traffic originating at or destined to points on the regular-routes sought is not timely made (cf. *Liquid Transporters, Inc., Extension—Limestone*, 94 M.C.C. 615, 618 (1964)), and applicant has not shown how, with such restriction, it could offer and maintain two distinct types of service in adjacent areas without exceeding the limits of the terms of its certificates and the provisions of the Interstate Commerce Act;

And it further appearing, That otherwise the pleadings raise no new or material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his initial decision, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of the pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge; and that the statement of facts, the conclusions, and the findings of the Administrative Law Judge, as modified herein, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is further ordered, That in No. MC-35628 (Sub-No. 343), said application be, and it is hereby, denied.

It is further ordered, That in No. MC-C-8089, respondent, Interstate Motor Freight System, be, and it is hereby, ordered and required to cease and desist forthwith, and thereafter to refrain and abstain from performing operations of the character found unlawful in said report, unless and until proper authority is obtained therefor; and that respondent is further required to comply with the provisions of Rule 99 of the Commission's General Rules of Practice (49 CFR 1100.99).

It is further ordered, That the said investigation in all other respects be, and it is hereby, discontinued.

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as May 25, 1976.

By the Commission, Division 1.

ROBERT L. OSWALD,
Secretary.

[SEAL]

OH

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. MC-35628 (Sub-No. 343)

INTERSTATE MOTOR FREIGHT SYSTEM
CONVERSION APPLICATION [1]

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1. In No. MC-35638 (Sub-No. 343), public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over regular routes, of general commodities with exceptions. Application denied.

2. In No. MC-C-8089, respondent found to be conducting regular route operations in interstate or foreign commerce as a motor common carrier, which operations are beyond the scope of its certificates. Cease and desist order entered.

Chandler L. Van Orman, Edward R. Malinzak, Richard H. Strodel, L. D. Verdier, Jr., Robert G. Seaks, and *Edward K. Wheeler* for applicant in the title proceeding and for respondent in the investigation.

G. M. Rebman, James S. Bowie, Louis Tarlowski, Kim D. Mann, Charles J. Lincoln, Sam Roberts, Lloyd M. Roach, James N. Clay, III, Steven C. Porter, and *Clayton B. Binion* for protestants in the title proceeding.

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[1] Also included in this report is an Initial Decision in No. MC-C-8089, Interstate Motor Freight System, A Corporation—Investigation and Revocation of Certificates.

Edward W. Arnn, Harry F. Horak, and *John J. Charuhas* for Bureau of Enforcement, Interstate Commerce Commission in the consolidated proceedings.

G. M. Rebman, Louis Tarlowski, Lloyd M. Roach, Charles J. Lincoln, Kim D. Mann, Sam Roberts, and *James S. Bowie* for intervenors in the investigation.

By Edward J. Reidy, Administrative Law Judge:

In the title proceeding, by application filed January 15, 1973 and later clarified, Interstate Motor Freight System, (IMFS) a corporation, of Grand Rapids, Mich., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of the commodities, from and to the points, and in the manner described in Appendix A hereto. This application has been filed by applicant in order to obtain permission to convert certain irregular route authority to regular route service.

In the embraced proceeding, by order of Vice-Chairman Brewer served June 1, 1973, the Commission instituted an investigation and revocation proceeding under the authority of Sections 204(c) and 212(a) of the Interstate Commerce Act looking into and concerning the operations of IMFS with a view toward determining whether it has been and is performing operations in interstate or foreign commerce between points in the States of Ohio, Missouri, New Jersey, Wisconsin, New York, Pennsylvania, Indiana, Michigan, Iowa, Nebraska, and the District of Columbia and points in Arkansas in a manner not authorized by its certificates. The investigation was prompted by the belief that IMFS has been transporting general commodities between its terminals at St. Louis and Kansas City, Mo., and other cities served by it and its various terminals in Arkansas, over regular routes, in violation of Section 206(a) of the Act and the terms, conditions, and limitations of its certificates. Following investigation the Commission expressed

its intention to issue such orders and take such other and further action as the facts and circumstances may appear to warrant.

IMFS was made a respondent in the investigation proceeding and the Commission's Bureau of Enforcement (Bureau) was directed to participate as a party. The order further provided if it is found that respondent has willfully violated and is willfully violating the provisions of the Act, an order may be entered suspending for a stated period, in whole or in part, the certificates issued to respondent, and if it is found that respondent whether willfully or otherwise, has violated and is violating the Act, an order may be entered requiring respondent to comply therewith and thereafter to maintain such compliance, and upon the willful failure of respondent to comply with such order, the certificates of said respondent may be suspended or revoked in whole or in part. Applicant-respondent has consistently denied any wrongdoing.

These proceedings came to be referred to the undersigned for hearing and the recommendation of an appropriate order accompanied by reasons therefor. A prehearing conference was held on September 24, 1973 at Washington, D.C. Hearings were held on October 15, 1973 thru October 19, 1973 at Kansas City, Mo.; and again on February 28, 1974 at St. Louis, Mo. Because of their relationship both matters were heard on a consolidated record and will be disposed of here in a single report.

The application in the title proceeding is opposed by Superior Forwarding Company, Inc., Jones Truck Lines, Inc., Be Mac Transport Co., Inc., Midway Motor Freight, Frisco Transportation Company, The Chief Freight Lines Company, The Santa Fe Trail Transportation Company, Texas-Oklahoma Express, Inc., Garrison Motor

Freight, Inc., Atlas Transit, Inc., Freightways Express, Inc., Mercury Motor Inc., and Southwestern Transportation Company.

In the investigation the Bureau appeared as complainant and IMFS appeared as respondent. Protestants in the title proceeding were permitted to intervene in support of the Bureau in the investigation. All parties herein will be referred to by appropriate short titles. Briefs have been filed by many of the parties herein and are discussed *infra*.

BACKGROUND

IMFS is basically a regular route motor common carrier of general commodities. It does, however, hold some irregular route authority and the fact of this duality has much to do with these proceedings. From its inception IMFS has grown both by extension applications as well as through acquisitions such that, today, it is a substantial carrier. Operations are conducted in that part of the country extending roughly from the northeast through the midwest to Arkansas, Kansas, Oklahoma, Nebraska and Denver, Colo. In sum, IMFS holds authority in 32 States and the District of Columbia.

The application proceeding at hand traces its origin to the time when IMFS purchased the operating authority of Southwest Freight Lines, Inc. (SFL). Commission approval of this acquisition was obtained on January 16, 1970 and applicant immediately began operating thereunder. Shortly prior to the purchase the Commission had removed from SFL's certificate, as well as all others, the restriction to transportation in truckload lots.[2] Once IMFS commenced operating the newly acquired rights, which by that time were shorn of the restriction, it took steps to provide a complete service, including of course

[2] *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455.

the transportation of LTL traffic. In this connection, terminal facilities were added; pickup and delivery service was inaugurated; and suitable personnel were employed. Indeed, IMFS expresses the feeling it had an "obligation" to render LTL service and to provide all the facilities required for that service.

Performance of this LTL service grew in volume and, in the opinion of applicant, gradually evolved into a service bearing all the earmarks of a regular route operation. To obtain appropriate certification to continue such a service, applicant has filed this application.

Growth of the LTL service with resultant regularity of certain operations also forms the crux of the investigation. While the applicant suggests its operations matured into regularity because of traffic demands, the Bureau claims the change to regular operations was done deliberately by IMFS, in knowing and open violation of the terms of its operating authority.

THE APPLICATION PROCEEDING

As has been mentioned, applicant is a substantial motor common carrier operating over regular and irregular routes in some 32 States. Its equipment fleet is enormous and varied. Some is leased but most is company-owned. Throughout its system IMFS maintains conveniently located and fully equipped terminal facilities to support its operations.

By this application, IMFS seeks to convert certain irregular route service to regular. Stated briefly, IMFS now is authorized to perform irregular route service in the transportation of general commodities with the usual exceptions, between points in Arkansas and Oklahoma on the one hand, and, on the other, Kansas City and St. Louis. What applicant seeks is to convert a portion of

that authority to regular route service over eight routes. Described in general terms, these routes are between:

(1) Kansas City and Oklahoma City, via Topeka;

(2) Kansas City and Oklahoma City, via Tulsa;

(3) Kansas City and Little Rock, via Joplin, Mo., and Fort Smith, Ark.;

(4) Kansas City and Little Rock, via Springfield, Mo., and Harrison, Ark.;

(5) Kansas City and Jonesboro;

(6) St. Louis and Oklahoma City;

(7) St. Louis and Little Rock, via Jonesboro; and

(8) St. Louis and Little Rock, via West Memphis.

Service is also sought at intermediate or off route points as described in the application. Service along routes (1) to (5) is to be restricted to the transportation of traffic moving from, to, or through Kansas City; whereas service along routes (6) to (8) is to be restricted to the transportation of traffic moving from, to, or through St. Louis. The full scope of the application is in Appendix A.

IMFS underscores its application with the assertion that it "seeks no new authority." Applicant states, too, that it has no intention to tack the sought regular route authority with any of the existing irregular route rights, at least to the extent of not performing a cross-haul in Oklahoma and Arkansas. All it wants by this application is ". . . to convert a portion of its existing irregular route authority . . . in Arkansas and Oklahoma to regular route authority within those two states." Applicant's claim is that movement of traffic since it acquired the rights from SFL has evolved into a repetitive pattern over regular routes between various points in Arkansas and Oklahoma and Kansas City and St. Louis such that

approval of its application is required to bring its authority in harmony with the services shippers demand.

Applicant has no intention to surrender any existing operating authority. In this connection IMFS points out that in rendering service say, from a point beyond Kansas City to any of the points named in its application, it will serve them over the sought regular routes. By the same token applicant will serve points in Arkansas and Oklahoma other than those named in the application pursuant to its existing irregular route authority which is statewide in those two States.

At the time SFL's rights were acquired in January of 1970, vendor was primarily a hauler of perishables. Its equipment, facilities and personnel were so oriented. Typically SFL made every effort to keep its refrigerated equipment on-line, so its transportation service was limited mostly to markets in Kansas City, St. Louis, Chicago, and points in Indiana. Applicant, on the other hand, already was operating into eastern markets when the acquisition was accomplished and soon thereafter expanded use of the acquired rights into these eastern markets. Refrigerated equipment was used for longer hauls to the East and was loaded with dry freight back to Oklahoma and Arkansas.

Upon inauguration of motor service under the acquired rights, IMFS says its regular shippers in the East began tendering to it more and more traffic, most of it LTL, destined to Arkansas and Oklahoma points. Lacking appropriate terminal facilities and sufficient equipment, IMFS initially interlined this tonnage at St. Louis and Kansas City. As traffic continued to develop, applicant determined to establish its own facilities and was able thereby to retain the traffic for a longer haul. As terminal facilities were establised, they were charged with the duty of handling the distribution of traffic, and also were given

the function to generate outbound traffic, both LTL and truckload.

Among the first terminals opened in response to growing traffic demands were those at Oklahoma City, Tulsa, and Little Rock. Opened in September 1970 along with the Oklahoma City facility, the Tulsa terminal was closed due to lack of traffic in February of 1971 and not reopened until November 1971. The Little Rock terminal was opened in August 1970. In early 1971 terminals were opened at Fort Smith and Fayetteville. A Jonesboro facility was opened in January of 1972. Shipments and revenues generated by the aforementioned terminals grew steadily. Traffic consisted largely of recurring LTL shipments of a wide range of merchandise and applicant's operations in this area became more akin to a regular route service.

IMFS says that sometime during the Spring of 1972 it became concerned over the noticeable development of regular and recurring traffic patterns. By June applicant had undertaken an analysis of this trend with a view toward discovering what points and areas would be likely candidates for a regular route application. The results of this study prompted IMFS to file a conversion application comparable to the one at hand. Such an application, originally filed in late July 1972 ran into "procedural problems" so was dismissed in January 1973. This application followed almost immediately.

Between the time this application was filed and the hearing opened, applicant concluded "on the basis of more recent traffic information" that El Dorado, Ark., and Bartlesville, Enid, and Muskogee, Okla., should be deleted from the authority sought. Applicant offered an amendment to this effect at the hearing, but the Judge disallowed the offer on the grounds that restrictive amendments offered that late were impermissible. There is

room for argument whether the proffered deletion is a true amendment but the cardinal point is to what extent the applicant has made out its case, and that is the only issue of moment.

To portray its financial posture, applicant submitted a balance sheet bearing an August 11, 1973 date. In addition it submitted an income statement showing that it had a net income (after income taxes) of $1.6 million for the year ending August 11, 1973. The balance sheet showed current assets of $9.1 million and total assets of $44.2 million. Current liabilities stood at $11.78 million.

Applicant has a fully staffed safety department whose function is to insure compliance by vehicles and drivers alike with all applicable rules and regulations.

Applicant's traffic manager testified in this proceeding and sponsored a wealth of traffic studies designed to support analytically applicant's contention that there had been a gradual transition from irregular to regular route service.[3] Although this witness could not select a specific date when, in his opinion, applicant's operations in the area involved became predominantly regular in pattern, he did hazard the view that development had unfolded clearly in late 1971 or early 1972.

As mentioned, IMFS presented into evidence a series of traffic studies or exhibits. The first study is an abstract of all shipments transported by IMFS from points in Arkansas and Oklahoma during November, 1972. November was chosen as being "representative." Included was traffic picked up by IMFS as well as that received from other carriers on an inter-line basis. That study showed IMFS had 2,642 shipments from points in Arkan-

[3] These studies do not, however, disclose what gateway through which the traffic passed, nor the route or highways which the freight traversed on its journey. Neither were they intended to do so.

sas and Oklahoma, having a total weight of 9.9 million pounds yielding $217,000 in revenue to IMFS. Applicant paid $4,245 to interline carriers for their portion of the movement during the month. Another study, concerning shipments transported by IMFS during November 1972 into Arkansas and Oklahoma, showed the following totals: 3,297 shipments having a total weight of 9.5 million pounds. Both of the foregoing studies included tonnage handled by applicant's Special Commodities Division.

Two other studies, one an abstract of shipments transported by IMFS from points in Arkansas and Oklahoma for November 1972, and a comparable exhibit relating to inbound traffic, were also introduced. Interline shipments were excluded from these exhibits. The exhibit covering outbound tonnage showed 2,301 shipments of 9.5 million pounds from which IMFS enjoyed revenues of $204,114. The inbound exhibit or that depicting IMFS as the delivering carrier, showed a total of 2,136 shipments having a total weight of 8.7 million pounds. From a comparison of the foregoing exhibits, IMFS suggests that interline carriers are not being used extensively by IMFS, nor has any appreciable revenue been received where interline has been used.

Another exhibit abstracted shipments transported by IMFS from its terminal locations in Arkansas and Oklahoma during November 1972 and which were received from interline carriers doing business with IMFS. Applicant points out that only 10 of the 44 interline carriers named on that abstract saw fit to oppose this application.

The next exhibit represents shipments interlined by IMFS at its terminal locations in Oklahoma and Arkansas for delivery by other carriers, even though IMFS held authority to make the delivery itself. Applicant says

that in these circumstances it was not efficient nor economic for it to have made delivery. Even after approval of the instant application Interstate does not intend to alter this policy of interlining where circumstances dictate, asserting that service to the public governs its actions.

Applicant also submitted abstracts of shipments handled by it during November of 1972 from and to the all cities named in its application. Totals from these abstracts are set out below. The first column for each city shows outbound traffic, the second inbound.

City	Shipments	Weight
Fayetteville (from)	30	22,133
Fayetteville (to)	80	100,447
Harrison (from)	63	72,020
Harrison (to)	39	66,808
Rogers (from)	79	59,047
Rogers (to)	25	29,169
Siloam Springs (from)	77	282,156
Siloam Springs (to)	18	79,210
Springdale (from)	274	627,786
Springdale (to)	190	333,952
Fort Smith (from)	123	1,023,328
Fort Smith (to)	158	529,870
Booneville (from)	136	196,203
Booneville (to)	11	6,178
Russellville (from)	35	1,231,058
Russellville (to)	210	643,243
Jonesboro (from)	252	146,755
Jonesboro (to)	70	114,013
Osceola (from)	226	357,102
Osceola (to)	13	7,513

City	Shipments	Weight
Paragould (from)	53	44,804
Paragould (to)	20	60,813
Walnut Ridge (from)	153	118,185
Walnut Ridge (to)	22	21,604
Little Rock (from)	153	461,678
Little Rock (to)	371	925,919
Hot Springs (from)	14	11,319
Hot Springs (to)	54	26,906
Jacksonville (from)	28	16,721
Jacksonville (to)	17	11,542
Pine Bluff (from)	-0-	-0-
Pine Bluff (to)	67	164,283
Prescott (from)	335	393,530
Prescott (to)	8	57,734
Oklahoma City (from)	227	954,413
Oklahoma City (to)	392	2,508,325
Ada (from)	7	217,732
Ada (to)	36	218,555
Ardmore (from)	26	71,363
Ardmore (to)	14	27,118
Tulsa (from)	112	534,398
Tulsa (to)	276	1,584,141
Sand Springs (from)	31	14,159
Sand Springs (to)	7	33,164
The cities below are those applicant sought to amend out:		
El Dorado (from)	6	21,289
El Dorado (to)	29	162,221
Bartlesville (from)	22	10,120
Bartlesville (to)	35	23,311

City	Shipments	Weight
Enid (from)	-0-	-0-
Enid (to)	34	16,028
Muskogee (from)	45	775,792
Muskogee (to)	42	119,250

Through its Special Commodities Division IMFS transported 252 shipments weighing 8,884,094 pounds to and from points in Arkansas and Oklahoma during November 1972. Its total traffic moved during that month amounted to 5,939 shipments weighing 19,447,178 pounds. Thus the General Commodities Division handled the difference, or 5,687 shipments with a total weight of 10,-563,084 pounds. The latter, general commodity traffic, was predominantly LTL.

IMFS also totalled all shipments originating at or destined to points in Arkansas and Oklahoma during 1970 and which were either delivered to or received from applicant at St. Louis or Kansas City for delivery beyond. IMFS places great importance on this data because it shows that the amount of traffic moving inbound to Arkansas and Oklahoma immediately after applicant's acquisition of Southwest was greater than the outbound movements. The totals inbound were 1,184,197 pounds represented by 1,652 shipments whereas the outbound totals were 839,709 pounds and 987 shipments.

An abstract of shipments transported by the Special Commodities Division was introduced to show that during 1970 it handled primarily frozen foods and perishable items to and from points in Arkansas and Oklahoma.

IMFS also introduced a series of traffic studies of shipments transported by it to and from "the area" of the cities named in its application during the period October 1971 to September 1973. These studies covered "shipments" transported by IMFS as well as "LTL ship-

ments," and are designed to reflect the amount of traffic handled.

The final part of applicant's presentation was the testimony of a regional vice-president familiar with the present day operations of IMFS in the area under consideration. In the belief that this witness was not competent to testify to matters beyond the current operations because he was new to the area and uncertain as to the realities of this application the Judge, on motion, struck much of the prepared testimony proffered by this witness. Despite applicant's challenge on brief that it was error for the Judge to have so ruled, the ruling is, upon further consideration, nonetheless persisted in for the reasons mentioned. Unquestionably the witness lacked first hand knowledge of what transpired prior to his assignment to this area and he conceded he was unfamiliar with the routes sought in the application.

Less truckload traffic from the east into Arkansas and Oklahoma is funnelled into an IMFS facility Columbus, Ohio, where it is accumulated into truckloads. Once consolidated, this freight moves to terminals in the named area through the gateways of St. Louis or Kansas City. For geographic reasons, traffic to the terminal at Jonesboro is accumulated at St. Louis. At the Arkansas or Oklahoma terminal point, IMFS breaks the bulk and peddles the traffic to destination or, at times, to another terminal. Between many of the involved points traffic movements today follow a predictable pattern.

Although, as mentioned, no prior witness testifying on behalf of applicant was able to describe any specific highway routing traffic of IMFS flowed over in the past, this witness was able to describe some current routings. Between St. Louis and Fayetteville, IMFS now runs daily in both directions, with a turn or driver exchange, at Springfield, Mo. The route "generally" followed is said

to be Arkansas Route 71 (more than likely U.S. Highway 71 is meant) to junction with State Highway 37 across the Arkansas-Missouri State line, thence to junction U.S. Highway 60 to Monette, Mo., thence over U.S. Highway 60 to junction with Interstate Route 44 and thence to St. Louis.[4] In this connection, applicant points out that it could use this route between Fayetteville and St. Louis as part of its run to Oklahoma City whenever traffic demands dictate. The Fayetteville terminal carries unusual importance in that traffic destined to or shipped from, the Fort Smith and Tulsa terminals is also handled across the Fayetteville docks.

From its Fort Smith terminal IMFS furnishes "regular" service to Russellville and Booneville. Sand Springs is served out of shipper's Tulsa terminal in that city trucks include that point on their daily runs throughout the Tulsa area.

Between Oklahoma City and St. Louis IMFS runs a daily truck in both directions because there is ample traffic to justify this frequency. Customarily Interstate 44 is used. Ada and Ardmore are served from applicant's Oklahoma City facility.

Daily trips in both directions are being made between St. Louis and Little Rock. Usually the route traversed is U.S. Highway 67 and Interstate 55, although there are times when Interstate 55 combined with Interstate 40 is the course followed. Prescott, Hot Springs, Pine Bluff and Jacksonville are served out of Little Rock. Prescott and Jacksonville served on a daily basis, the other points receive regular service.

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[4] This description is somewhat confusing to the Judge for he has been unable to find any point where U.S. Highway 71 intersects with State Highway 37. Apparently U.S. Highway 62 is used to bridge the gap.

Daily service is also rendered between Jonesboro and St. Louis. The typical route runs from Jonesboro north on U.S. Highway 63 to intersection U. S. Highway 67 at or near Hoxie, Ark., thence to St. Louis. At times the northern leg of this run is made over Interstate 55 from Crystal City to St. Louis. Walnut Ridge, Paragould and Osceola are served out of the Jonesboro terminal and receive daily service.

The preponderance of applicant's traffic to and from points in Arkansas and Oklahoma moves over the St. Louis gateway simply because applicant's route structure is concentrated in the Middle West and East. Tonnage handled over the Kansas City gateway is on the increase, however, even though traffic demands do not now necessitate daily schedules moving to and from Arkansas and Oklahoma over that gateway point.

THE INVESTIGATION PROCEEDING

At the outset of this proceeding, the Bureau and respondent entered into a stipulation of facts pertaining to the issues at hand. The first portion of the stipulation set forth many particulars as to applicant's rights and equipment, most of which have already been described in this report, so will not be repeated. Other portions of the stipulation, commencing with paragraph 10, are recounted here verbatim.

10. An investigation was made by District Supervisor William H. Land, Jr. covering operations in the months of December, 1971, and July, 1972, at Interstate's terminals in Arkansas and in St. Louis and Kansas City, Mo.

11. During December, 1971, and July, 1972, all shipments from the Little Rock terminal were transported only to or through St. Louis and Kansas City, Mo. There were two types of dispatches of

loaded semi-trailers for over-the-road movement from the Little Rock terminal to St. Louis, Mo. One type was called a Neeleyville turn. The terminal manager at Little Rock would contact the St. Louis terminal of Interstate and coordinate a dispatch from Little Rock so that the driver from St. Louis and the driver from Little Rock would meet at Neeleyville, Mo., which is just across the state line from Arkansas on or near U. S. Highway 67. The second type of dispatch from Little Rock involved instances in which the Little Rock driver would take the unit all the way to St. Louis, lay over and then return to Little Rock with another unit. Three instances were discovered in December, 1971, in which a trailer was dispatched from Little Rock to the Kansas City, Mo. terminal of Interstate.

12. The terminal manager at Little Rock, Tom St. Clair, admitted that during this period his terminal had daily departures with sometimes as many as 3 or 4 trailers in one evening. The Little Rock terminal manager also indicated that on occasion half loaded trailers are dispatched in order to meet a full loaded trailer at the Neeleyville, Mo., turning point and that shipments in the Little Rock area were also dispatched promptly to take care of customers.

13. During the month of December 1971 there were several bid runs from the Little Rock terminal to various points in Arkansas such as Prescott, West Helena, Fordyce and Jonesboro, Ark.

14. During a part of this period Interstate also had a terminal operation at Ft. Smith, Ark., which had Owens Trucking Company, a local company, perform all pickups and deliveries. Interstate's Ft. Smith drivers performed two types of operations

to St. Louis, Mo., one type being a so-called turn at Springfield, Mo., in which the driver swapped equipment with a driver out of St. Louis and the other type of operations was where the driver took the loaded equipment the entire distance to St. Louis, laid over and returned to Ft. Smith. Ft. Smith drivers also on occasion laid over and returned loaded units from Kansas City to Ft. Smith.

15. During 1971 Interstate originated some shipments on its own authority in the eastern and central part of the United States, transporting such shipments through St. Louis or Kansas City, Mo., to Little Rock, Ark., and interlining at Little Rock such shipments with other carriers such as Mercury Motors, Inc., Midway Motor Freight Lines, Inc., Powell Truck Line, Inc. and Atlas Transit, Inc. All of such shipments were destined to points in Arkansas, which, under its irregular route authority, Interstate could serve since the shipments had come through St. Louis.

16. Records obtained by Land concerning all these operations indicate that numerous LTL shipments were transported for numerous shippers. The terminal managers at both Little Rock and Ft. Smith served as solicitors for traffic. The Little Rock terminal at one time also had a separate individual employed as a solicitor of traffic.

17. In May of 1972 Interstate had terminals in Little Rock, Ft. Smith, Fayetteville, and Jonesboro, Ark. Interstate has published a routing guide for St. Louis, Mo., indicating that all shipments in Arkansas with minor exceptions are to go through Little Rock and Ft. Smith, Ark. Such routing guide has a revised date of August 14, 1971, on it. Interstate has also published a Little Rock routing guide

which depicts a schematic map showing routes between Fayetteville, Ft. Smith, and Little Rock on the one hand and St. Louis on the other, as well as listing the various terminals of Interstate to which shipments from Arkansas should be routed.

18. Bulletin No. 76 dated September 16, 1970, under the subject of new terminal openings announced the opening of the Oklahoma City and Tulsa, Okla. and Little Rock, Ark., terminals. Bulletin No. 75 (Bulletin numbers begin anew each year.) issued by Interstate dated October 26, 1971, showed a schedule of LTL nightly turns from St. Louis to Little Rock, Fayetteville and Ft. Smith, Ark., over the signature of one J. M. Mooney, vice president, which also described a need to sell heavily to support the described runs. On November 27, 1971, the office of Interstate at Omaha, Nebr., sent a memorandum to all managers and salesmen of Division 8 concerning outbound LTL performance for the 11th period. On December 15, 1971, the Omaha, Nebr., office of Interstate sent a copy of a memorandum to the terminal manager of Interstate at Ft. Smith, Ark., concerning the creation of the Jonesboro, Ark., terminal effective January 4, 1972, and the division of responsibility between the Jonesboro terminal and other Arkansas terminals. A teletype to terminals from Vice President J. M. Mooney dated February 10, 1972, informed the terminals that effective immediately Columbus (Ohio) was starting a direct Little Rock trailer, Columbus was starting a Fayetteville trailer loading their Fayetteville, Ft. Smith, Tulsa, and Oklahoma City to Fayetteville, Fayetteville would break and distribute these points, and Jonesboro Freight would continue to be loaded at St. Louis.

19. In performing service to Arkansas from points east of the Mississippi River Interstate utilized

its regular route authority to either St. Louis or Kansas City, Mo., and then used its irregular route authority from St. Louis or Kansas City, Mo., to transport the shipment to the Arkansas terminals. The reverse is true with respect to Arkansas origin shipments.

20. It is agreed that the Administrative Law Judge herein and the Commission may take official notice of the entire docket in No. MC-F-10174, Interstate Motor Freight System—Purchase—Southwest Freight Lines, Inc. and Direct Transports, Inc. and particularly pages 32 and 33 of the Report and Order of Hearing Examiner Thomas R. Roper.

In addition to the stipulated facts, the Bureau also elicited testimony from several witnesses. The first was a employee of protestant Garrison who had performed for protestant the special assignment of observing operations of IMFS in and around Harrison, Ark. These observations extended from November 30, 1971 to December 17, 1971. During that time the witness observed 13 instances or days on which an IMFS truck and driver made pickups or deliveries in and around Harrison. In most instances the driver stopped at more than one place of business on a given day.

A former terminal manager at the Little Rock facility of IMFS also testified. His assignment as terminal manager began in October of 1970. At that time the facility consisted of three doors, office space and about 15,000 square feet of dock space. This was the initial IMFS facility in the Little Rock area and from the outset it was important to generate freight. Outbound traffic acquired moved through the St. Louis terminal and where there was inbound tonnage the traffic moved according to scheduled turn at Neeleyville.

After the terminal was opened and traffic was solicited there soon developed a regular operation to pick up freight

at such points in Prescott, Fordyce and West Helena, Ark. Such operations were in response to nearly daily requests for pickup by the shippers located at these points. In soliciting freight the object was to get freight without regard to type. Pickup of freight was accomplished upon call.

IMFS's former terminal manager at Fort Smith also testified. He opened that terminal in January 1971 and it had 12 doors and three employees. For the first 18 months a cartage agent was used locally and the terminal had a trailer bank of over-the-road equipment.

Most freight generated through the Fort Smith terminal went to the St. Louis gateway, although some was channelled through Kansas City. At the start of operations, there were about 3 trips each week to St. Louis. Many of these involved a turn at Springfield, Mo. After a time a facility was established at Fayetteville and traffic from Fort Smith would be routed over the Fayetteville terminal where either break bulk or consolidation might be accomplished.

Another witness who had been general traffic manager of SFL at the time it was acquired by IMFS also testified. He left IMFS in August of 1973. At the time of the takeover in 1970, Southwest had no terminals nor call stations in Arkansas and had no scheduled runs in that State. Operations conducted pursuant to the prior SFL rights were kept distinct from IMFS's other operations.

The Bureau also elicited testimony from a former employee of IMFS who, during 1971 and 1972, was a salesman for respondent. As such his role was to solicit freight and while all tonnage was sought, volume and LTL in the range of 1,500 pounds or more was preferred. All customers in the Little Rock area were solicited, but those which gave more tonnage were identified by a code

system and efforts were made to afford them expedited or better service than those tendering less freight.

An Interstate Commerce Commission District Supervisor stationed at Little Rock, also testified. In that role he had conducted two investigations, beginning in January 1972, into the operations of IMFS. The heart of his testimony is set forth in the stipulation earlier detailed.

In the investigation proceeding the respondent felt no need to present affirmative testimony, believing that the facts of record substantiated its contentions as to "evolvement."

PROTESTANTS

Because the application proceeding was prosecuted according to applicant's theory that the factual predicate demonstrated reveals an evolution of operations begun as irregular route service but now following a regular route pattern, it was possible to enter into a stipulation with respect to the testimony of protestants. Phrased in general terms, which indeed seem sufficient for the purposes at hand, it was agreed that all protestants held some authority which enables them to serve various points in Arkansas and Oklahoma; that these protestants are able and willing to serve within the scope of their operating authority; and that if the conversion from irregular service to regular route operations is approved as sought some traffic they presently handle would be subject to diversion. Given this, and in light of the ultimate conclusions herein reached, it is unnecessary to spell out any further the evidence of protestants.

BRIEFS

Most of the parties filed either formal briefs or at least expressions of position. The gist of these pleadings will be here described. Before that, however, it should be

noted that although IMFS expressed considerable concern over the disclosure facets of section 222(e) throughout the hearing, and despite the fact that the Judge specifically requested that this issue be given attention on brief, IMFS ignored the request for its brief is totally silent on this issue. Such indifference was not anticipated; knowing less, the Judge expected more. Nor were the protestants much more helpful although some at least mentioned the question.

The brief of IMFS deals both with the application and the investigation, and it sees these proceedings as allied to each other. For this reason it is unnecessary to sort out any particular argument as applicable to the investigation or application and all will be mentioned collectively. The principal arguments IMFS advances are these:

(a) its establishment of terminal facilities not long after acquisition of SFL's rights was in satisfaction of its obligation to handle all freight, including LTL, and was not accomplished for the purpose of facilitating regular route operations;

(b) evolvement of its operations from irregular to regular was rapid and unforeseen, as both its evidence and that of the Bureau plainly shows;

(c) the line of demarcation between regular route and irregular route service has been recognized by the Commission as very thin, so that in borderline cases the Commission has expressed an intention to side with the carriers seeking conversion;

(d) historically the Commission usually grants conversion applications in circumstances such as here where a request for conversion is properly and diligently filed;

(e) protestants' contention that applicant would, if this conversion is approved, hold duplicate author-

ity is not meritorious, because the regular routes approved would replace the irregular *pro tanto*; and

(f) the evidence produced by the Bureau actually establishes that the conversion should be approved rather than showing any wrongdoing.

Finally IMFS claims, without argument, that it was error for the Judge to have excluded portions of the testimony of its Regional Vice-President but, considers that its case was made out even without regard to the stricken testimony.

Protestants Atlas and Freightways take the position on brief:

that the proof in the instant proceeding does not clearly and unequivocally show the rendition of a daily regular route service between any two respective points served by Interstate. The proof does show, however, that Interstate has deliberately established terminals at key points within the Arkansas-Oklahoma territory and has attempted to attract all traffic it could in a manner more directly compatible with a regular route service than an irregular route service.

Protestants also insist that it is contrary to Commission policy to authorize a carrier to serve a point or territory under both regular and irregular route service. In its letter-brief, protestant Frisco echoes much the same arguments as just set out.

Garrison, on brief, advances this fundamental argument:

because applicant has no intention of surrendering any of its existing irregular route authority, this proceeding must be considered a request for new rights for which no need has been shown, citing

Overnite Transp. Co. Ext.—Conversion To Regular Routes, 79 M.C.C. 231. So seen, it contends denial is dictated.

In their joint brief, Superior, Jones, Be Mac and Midway say that the failure of IMFS to present evidence that it conducted operations along a "defined regular route" is fatal to its application herein; and the evidence shows an unlawful conversion which ought to compel the issuance of a cease and desist order.

In another joint brief, Chief, TOX and Santa Fe Trail argue that applicant has not shown that it is now providing a regular route service to, through and from Kansas City or St. Louis on the one hand, and, to through and from points in Oklahoma on the other; and that to the extent IMFS is performing regular-route service, that service has been part of an illegal conversion.

The Bureau, in its brief, directs its arguments toward the investigation proceeding. After analyzing the facts of record in light of the criteria enumerated in the *Brady* case[5] the Bureau submits that the record clearly establishes that respondent has been performing transportation between points in Arkansas and other areas in a manner not authorized by its operating authority. It concludes, therefore, that its case has been made out.

DISCUSSION AND CONCLUSIONS

The application portion of this proceeding involves a determination of whether IMFS is entitled to a certificate of public convenience and necessity enabling it to convert certain irregular route service in Arkansas and Oklahoma to regular operations. The investigation phase focuses on a kindred matter, that is to say, whether IMFS has

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[5] *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23.

improperly operated as a regular route carrier in Arkansas where its underlying authority limits it to the performance of irregular route service. The interrelationship of the two matters is readily apparent from the evidence disclosed and is recognized in the arguments of the principal parties. For its part, IMFS says the operations in question have indeed become regular in nature, but adds promptly the transition was caused by traffic and market demands and was not originated by any conscious act by it. The Bureau, too, asserts operations in Arkansas at least bear all the signs of regular route service, but claims transformation was deliberately induced by IMFS in knowing violation of the Act. Protestants also join in the argument over the character and propriety of the operations performed by IMFS since its acquisition of the SFL rights.

Characteristics distinguishing regular from irregular route operations were originally announced in detail in the *Brady* case, *supra*. That the Act contemplates these two different types of service is no longer open to question. *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 114 [6] and *United States* v. *Maher*, 307 U.S. 148. The Act, however, does not itself make the distinction so the power and duty to establish classification between the two services resides in the Commission. *Brady Transfer & Storage* case, *supra*, at 114. The Commission has performed this duty and the classification criteria thus established have been found reasonable. *Brady Transfer & Storage* case, *supra*, at 116.

Notwithstanding the sweeping judicial imprimatur gained from the cited cases, this Commission undertook, in *Motor Common Carriers of Property—Routes and Services*, 88 M.C.C. 415, to look anew at the criteria established to ascertain whether their validity was still

[6] Aff'd 335 U.S. 875.

clear in light of more modern business practices. Upon reconsideration, the distinguishing criteria were again found to be proper and reasonable. Significantly the Commission repeated in the *Routes and Services* case, *supra*, what it had stated previously in the *Brady* case, *supra*, that it was not possible to lay down an inelastic rule by which the irregular or regular route characteristics of all operations could be determined, conceding that too much depends upon the peculiarities of each operation. Nonetheless the distinction continues to be recognized and applied even though the delineation has not always been an easy one. Because the distinction exists and is recognized, an irregular route certificate cannot be used to provide regular route service. *Falwell* v. *United States*, 69 F. Supp. 71, affirmed per curiam, 330 U.S. 807.

Carriers in general have been repeatedly made aware of the fact that they may not, without authority, convert irregular route operations to regular route service. To be sure, IMFS was specifically advised in the finance proceeding whereby it acquired from SFL the rights in question that it would be expected to preserve the distinction between regular and irregular route service. Not only that, but IMFS promised to do so. Informed by experience that service by general commodity carriers holding irregular route authority, unless guarded against, inclines toward regular route service, the Commission has cautioned such carriers that when the tendency is noted steps should be taken either to check that tendency or conversion quickly should be sought: *Brady*, case, *supra*, and *Hart Motor Exp., Inc.* v. *Midwest Motor Exp., Inc.*, 92 M.C.C. 558. IMFS has chosen the application route, and, in doing so, makes so much of the fact that its application was filed initially on July 28, 1972, although that application was subsequently dismissed in January of 1973 and followed immediately by the instant application. Contrast this July 1972 date, says IMFS, with the fact that the Commission order commencing this in-

vestigation was not issued until June 1, 1973, some ten months later. From this, IMFS argues that it has acted diligently in seeking conversion. But if it be proper, as IMFS suggests on brief, to afford the dates in this proceeding more than customary significance, it must be remembered that the Commission order of June 1973 was the culmination of a broad investigation commenced in January of 1972. As the investigation matured the Commission felt there was reason to believe applicant-respondent was performing operations beyond the scope of its authority, and the formal proceeding herein was instituted. In other words, the fact there was some question about the propriety of its operations was known to IMFS as early as January 1972, so applicant's asserted diligence in seeking conversion here seems to have heightened only after it heard the footsteps growing louder. Applicant's suggestion that its request for conversion stems wholly from its own initiative is, therefore, partially weakened by consideration of all relevant dates.

In the opinion of the Judge the evidence on the issue of whether operations by IMFS in Arkansas have gradually evolved into a regular pattern or whether the transition was encouraged in knowing violation of the terms of its certificate is preponderantly against applicant-respondent. The change did not develop gradually or haphazardly, but was immediate, unretarded and encouraged. IMFS has not merely increased the quantity of its irregular route service. It has changed the type of service offered and seeing the opportunity to increase business by adopting the techniques of regular operations has encouraged such development. Not long after the SFL rights were acquired regular operations became the vogue, not the exception. Despite its promise in the acquisition proceeding (No. MC-F-10174) to preserve the distinction between irregular and regular operations, the evidence shows IMFS undertook a concerted effort to blend the newly acquired operations in Arkansas into a regular

pattern consistent with its systemwide operations. Consideration has been given to the position advanced by IMFS—that the transition was the result of natural evolvement—but the Judge concludes that position is not supported by the facts. This conclusion is, of course, anchored to an analysis of the *Brady* criteria, *infra*, and the recurrent Commission pronouncements concerning the necessity of keeping irregular and regular operations separate.

The *Brady* criteria indicative of a regular route service are: (a) operations according to a predetermined geographical plan or outline; (b) movement of significant amounts of particular types of less-than-truckload traffic; (c) vigorous solicitation of less-than-truckload or any other particular type of traffic; (d) maintenance of terminals devoted to, and designed for, the expeditious handling of less-than-truckload traffic; (e) habitual use of certain fixed routes; (f) operation between fixed termini; (g) marked or constant periodicity in the service given; and (h) operation of vehicles according to definite or published schedules or their equivalent. No factor is absolutely controlling, although habitual operations over fixed routes is the single most outstanding characteristic of regular route operations.

Predetermined plan Under this criterion, regular-route operations are indicated when service performed assumes a pattern of territorial consistency such that operations of an upcoming week or period of time can be reliably forecast. Irregular route operations on the other hand tend to be more flexible territorially and more adaptable to shifting demands. Beginning as early as October 1971, IMFS established a schedule of nightly turns between St. Louis and Little Rock, Fayetteville and Fort Smith. Where necessary, half-loaded trucks were dispatched to complete the aforementioned "Neeleyville turn" so that schedules out of Arkansas were fully syn-

chronized with those coming in. All LTL freight coming into, or moving out of Arkansas moved through established terminals in that State and made its journey in a manner akin to regular route operations.

It should also be pointed out that operations performed by IMFS under authority previously held by SFL varies noticeably from those provided by its predecessor. True, the truckload lots restriction was removed about two years before the transaction, but IMFS continues to handle perishables in the manner SFL did, while at the time offering a full blown less truckload service as well. Bearing in mind applicant's solicitation efforts, its establishment of terminals and its overall encouragement of less truckload traffic, the Judge finds this circumstance an indication of IMFS's unauthorized rendition of regular service and a predetermined plan to do so.

Character of Traffic Consistent day to day transportation of aggregated lots of varied LTL shipments is more a characteristic of regular than irregular operations. Irregular-route carriers also transport LTL, but generally that traffic is specialized or limited in variety, handled to avoid an empty return, or top loaded. As seen, traffic carried by IMFS in the area in question rapidly developed into accumulated LTL shipments of miscellaneous merchandise—a factor pointing toward regular route operations.

Solicitation Two distinguishing characteristics under this criterion include the appreciation that solicitors in the employ of regular route carriers try to reach more shippers than do their counterparts used by irregular route carriers, and regular route carriers seek both less truckload and large volume traffic whereas irregular route carriers tend to concentrate on the latter. Quite clearly the testimony of applicant's witnesses as well as the Bureau's show that IMFS, from the outset, solicited all shippers in Arkansas (and Oklahoma) for whatever

volume and type of traffic was available. IMFS takes the position that under the authority acquired from SFL it was obliged to handle, and therefore sought, traffic in all volumes, large and small. But the Judge finds that applicant's solicitation efforts went well beyond propriety for the holder of irregular route rights. Consider the IMFS system map (Exhibit H-5). The map, a handy schematic outline of applicant's authority is used by salesmen in soliciting traffic. An outline of the eastern two-thirds of the United States, the map consists of a number of straight lines in red connecting various terminal points on its system. In addition to the described lines, the map has shaded in pink the entire States of Nebraska, Iowa, Illinois, Kansas, Oklahoma, and Arkansas. To assist the reader in understanding the map, there is a legend. The legend describes the shaded pink area as "irregular route authority." The straight red lines are labeled simply "routes." Notable on the map are straight red lines (routes) from St. Louis (a) thru Tulsa to Oklahoma City, (b) thru Fayetteville and Fort Smith to Little Rock, and (c) thru Jonesboro to Little Rock; and from Kansas City (a) thru Wichita to Oklahoma City, (b) to Oklahoma City, and (c) thru Tulsa to Oklahoma City. With that in mind consider, too, that the straight red lines are the same throughout this map, even where IMFS has clear authority to provide, and is providing, regular route operations. In the opinion of the Judge, the use of this solicitation map strongly suggests the emphasis IMFS places on regular routes, even in Arkansas (and Oklahoma).

On October 26, 1971, IMFS issued a bulletin describing the establishment of five nightly schedules between St. Louis and Little Rock, Oklahoma City, Fayetteville, Fort Smith and Tulsa. The stated purpose in establishing these schedules was "To further improve service and our Southwest LTL traffic . . ." Anticipating "light runs" at their inception the managers and sales representatives con-

cerned were urged "to sell heavily" and were advised their results would be monitored. Such a sales impetus is found to be inconsistent with the assertion by IMFS that regular route operations were the natural result of traffic demands. Operations described in and around Harrison, Ark., also suggest an effort on the part of IMFS to serve varied shippers.

Based upon the foregoing, the Judge concludes that in its solicitation efforts, IMFS has assumed the posture of a regular route carrier even in those areas where it is not authorized to render such service. More importantly, it is also found that IMFS has, by its solicitation efforts, improperly encouraged the development of its regular route operations. That these efforts have been successful is borne out by the large volume of less-truckload tonnage it has reaped.

Terminals and Call Stations Irregular route carriers from time to time establish terminal facilities to support their operations. Regular route carriers, on the other hand, virtually require terminal facilities at principal points in order to expedite and handle efficiently less-truckload traffic. Noteworthy herein is the fact that within nine months of its acquisition of the SFL rights IMFS opened three terminals for the specific purpose of sorting, aggregating and distributing less-truckload tonnage. At the same time pickup and delivery service in areas near the new terminals was inaugurated. As a general proposition, IMFS operated its terminals in Arkansas (and Oklahoma) where it held only irregular route authority in the same manner it operated terminals throughout its system where only regular route authority was held. When the terminals were opened in 1970, officials of IMFS emphasized the need to acquire sufficient tonnage to justify their expense, thereby spurring increased solicitation of all traffic, a circumstance strongly suggestive of regular route operations. The fact that they came about so soon

after the acquisition of SFL's rights, leads the Judge to find there was a conscious effort by IMFS to foster regular routes, although irregular route rights only were held in the area.

IMFS contends that the establishment of terminals was for the purpose of handling inbound freight which had developed once it began operations under the rights acquired from SFL. This contention is seen as too one-sided and is belied by the fact that once the terminals were opened, and some were opened as early as September, 1970, personnel at these terminals began "selling . . . business in this new territory" Such selling is found to be a factor nourishing, not checking, the growth of regular operations.

Fixed Routes and Fixed Termini Adherence to fixed routes has been singled out as the most telling trait of the regular route operator. In the case at hand the specific routes followed were never identified by any witness called by IMFS and the Judge is unable to describe the exact routes followed. That fact notwithstanding, applicant-respondent has conducted systematic operations between fixed termini for beginning as early as December, 1971 all Little Rock traffic went either to Kansas City or St. Louis, and IMFS commenced on October 26, 1971, five nightly runs between St. Louis and Little Rock, Oklahoma City, Fayetteville, Fort Smith, and Tulsa. By February, 1972 IMFS had established a direct trailer between Columbus and Little Rock and began using Fayetteville as a break bulk and distribution point. These facts serve to bolster the Judge's conclusion that IMFS deliberately and consciously exceeded the permissible scope of its irregular route certificate.

Schedules or their equivalent Observances of fixed, published schedules without regard to traffic available is the ultimate in regular route operations. As seen, IMFS established a series of five "Scheduled LTL Nightly On

Turns" beginning October 26, 1971, a clear indication of regular operations.

Periodicity of Service Where service is repetitive in character and known and relied upon by shippers as so being, there is a strong indication of regular route operations. Clearly the fact IMFS scheduled nightly runs as aforesaid is a service so repetitive in character so recurrent in frequency as to strongly suggest that IMFS was engaged in regular route operations. It is so found.

The evidence is substantial that IMFS has long been performing regular route operations in an area where its operating authority permits only the rendition of irregular route service and therefore is performing as a motor common carrier transportation not authorized by the terms of its certificate. It must stop doing so.

Although the application embraces the States of Arkansas and Oklahoma, the investigation matter deals only with Arkansas. It seems quite evident that operations in Arkansas and Oklahoma are being similarly performed and that the findings as to one State are equally valid as to the other. The investigation was limited to Arkansas, and the cease and desist order will be so limited. Nonetheless, applicant should be aware from this finding that its operations in Oklahoma ought to be brought into compliance with applicable rules and regulations.

In the application proceeding, the Judge concludes that the request for authority should be denied in all respects. The standard by which conversion applications are to be measured in the *Brady* case, *supra* is, of course, whether the public convenience and necessity require the operation. In this connection, the *Brady* case, *supra*, has recognized that an "increasing and constant volume of lawful past operations" are factors to be considered in applying the standard. More recent cases, such as *Tidewater Express Lines, Inc. Conversion Application*, 103 M.C.C. 694, point

out that the conversion standard is oftentimes less stringent than in the usual public convenience and necessity proceeding. Be that as it may, the Judge nonetheless finds IMFS has not carried its burden even under an eased standard. First, only past lawful operations are entitled to weight, and the Judge has already found applicant's prior operations in Oklahoma and Arkansas to have been unlawfully conducted. No shipper support has been presented herein and conversions without shipper support are most infrequent. In large measure, the application proceeding falls of its own weight.

In *Bi-State Express, Inc., Interpretation*, 111 M.C.C. 615, it was emphasized that a conversion of authority is granted in lieu of, rather than in addition to, existing authority. Here applicant has stated that it has no intention of surrendering any authority, nor has IMFS suggested how it can continue to preserve the distinction between regular and irregular service under the dual authority it would have in Arkansas and Oklahoma if this conversion application is approved. *R. Kuntzman, Inc., Extension—Alliance, Ohio*, 95 M.C.C. 371, stands for the proposition that approval of a situation wherein a motor carrier could serve the same points under both regular and irregular route authority would not be in the public interest and in accordance with the Commission's goal of practicable and effective regulation. Compare, also, *Neuendorf Transp. Co. Conversion Application*, 100 M.C.C. 188, and *Frisch Extension—Regular Routes*, 81 M.C.C. 546, where successful conversion applicants were required to relinquish certain duplicating authority.

In the opinion of the Judge, *Cole's Exp. Route Conversion Application*, 99 M.C.C. 783, fastens upon cases of this character the requirement that a successful conversion applicant must request, and presumably abide by, a restriction providing that it shall not, pursuant to irregu-

lar route authority simultaneously held, serve any points authorized to be served in regular route operations. IMFS has lost sight of this concept and the very fact that it has no intention of giving up any authority is, to be sure, a supplementary basis for the denial herein. Compare *Daniels Motor Freight, Inc., Extension—Regular Routes*, 61 M.C.C. 808 (not printed); 9 Fed. Carr. Cases 573.

In this proceeding, IMFS expressed an intention to commingle freight being handled in irregular route service with that being handled in regular operations where traffic movement suggest this as the most practicable approach. To do so would be in stark contrast to the off-quoted requirement that the distinction between regular and irregular operations be preserved.

And a final point which buttresses denial of the application. Despite considerable effort IMFS expended to prepare traffic studies in this proceeding, none of them show what route the studied traffic followed. Neither could any witness testify as to what route was used, although there is some testimony as to present routings. In other words, there is no probative evidence which would enable the Commission to determine whether the exact routes sought had in fact been used to handle traffic in the past. In the absence of shipper support, the studies are all that can be considered. As mentioned, they are silent on this point, leaving to conjecture the route followed. Conjecture cannot support a finding of public convenience and necessity.

The foregoing reasons compel the Judge to conclude that the application should be denied.

The National Environmental Policy Act of 1969 requires a threshold determination of whether agency action such as here taken is a major Federal act having a significant impact on the quality of the human environment.

If it is, then a detailed environmental impact statement must be prepared and considered. Otherwise not.

In the appraisal of the Judge, this is not such an action as to require the preparation of a detailed environmental statement. From an environmental standpoint the impact of denying the requested conversion to regular route service will be imperceptible. The result of this denial, coupled with the cease and desist order, will require IMFS to provide only irregular route, or call-and-demand service. Arguably such a service will alleviate highway congestion and preserve the national fuel supply by requiring operations only when service is demanded. What is more, this decision in no way affects the amount of tonnage to be moved, although it may have some impact on who will move it.

In no way does this decision present any question of environmental degredation by new technology or of any large scale program or chain of contemplated projects resulting in an irretrievable commitment of resources which are matters of direct concern by a national environmental policy.

Because there is no discernible danger of adverse environmental consequences resulting from this decision, no further quantification of environmental effects is required. Importantly, no party has suggested anything which conflicts with the environmental views herein expressed.

ULTIMATE FINDINGS AND ORDER

Upon consideration of the record herein, the Administrative Law Judge finds (1) applicant has failed to establish that the present or future public convenience and necessity require the proposed operation; (2) respondent has knowingly been performing operations as a motor common carrier in interstate or foreign commerce in a manner not authorized by the scope of its operating au-

thority; and (3) that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is therefore the ORDER of the Administrative Law Judge that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, that the effective date of this order shall be 30 days from the date of service hereof.

It is further ordered, That the application in No. MC-35628 (Sub-No. 343) be, and it is hereby, denied.

And it is further ordered, That in No. MC-C-8089, Interstate Motor Freight System be, and it is hereby, ordered and required to cease and desist forthwith from the motor carrier operations which it is found herein now to be conducting without appropriate authority from this Commission and thereafter to refrain and abstain from a resumption of such operations until appropriate authority therefor has been obtained from the Interstate Commerce Commission.

Dated at Washington, D. C. this 8th day of July 1974.

By the Commission, Edward J. Reidy, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX A

OPERATING AUTHORITY SOUGHT BY APPLICANT

Interstate seeks a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle, over regular routes, transporting general commodities (except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment) (1) Between Kansas City, Kans.-Mo., and Oklahoma City, Okla.: From Kansas City over Interstate Highway 70 to Topeka, thence from Topeka over Kansas Turnpike to junction Interstate Highway 35, thence over Interstate Highway 35 to Oklahoma City, and return over the same route; (2) Between Kansas City, Kans.-Mo., and Oklahoma City, Okla.: From Kansas City over Interstate Highway 35 to junction U. S. Highway 59, thence over U. S. Highway 59 to junction U. S. Highway 169, thence over U. S. Highway 169 to Tulsa, thence over Interstate Highway 44 to Oklahoma City, and return over the same route; (3) Between Kansas City, Kans.-Mo., and Little Rock, Ark.: From Kansas City over U. S. Highway 71 to junction Interstate Highway 40, thence over Interstate Highway 40 to junction U. S. Highway 167, thence over U. S. Highway 167 to Little Rock, and return over the same route; (4) Between Kansas City, Kans.-Mo., and Little Rock, Ark.: From Kansas City over U. S. Highway 71 to junction Missouri Highway 7, thence over Missouri Highway 7 to junction Missouri Highway 13, thence over Missouri Highway 13 to Springfield, thence over U. S. Highway 65 to Little Rock, and return over the same route; (5) Between Kansas City, Kans.-Mo. and Jonesboro, Ark.: From Kansas City over U. S. Highway 71 to junction Missouri Highway 7, thence over Missouri Highway 7 to junction Missouri Highway 13, thence over Missouri Highway 13 to Springfield,

thence from Springfield over U. S. Highway 60 to junction U. S. Highway 63, thence over U. S. Highway 63 to Jonesboro, and return over the same route; (6) Between St. Louis, Mo., and Oklahoma City, Okla.: From St. Louis over Interstate Highway 44 to Oklahoma City, and return over the same route; (7) Between St. Louis, Mo., and Little Rock, Ark.: From St. Louis over Interstate Highway 55 to junction U. S. Highway 67, thence over U. S. Highway 67 to Little Rock, and return over the same route; (8) Between St. Louis, Mo., and Little Rock, Ark.: From St. Louis, over Interstate Highway 55 to junction Interstate Highway 40, thence over Interstate Highway 40 to junction U. S. Highway 67, thence over U. S. Highway 67 to Little Rock, and return over the same route; serving the following intermediate or off-route points in (1) through (8) above: Booneville, El Dorado, Fayetteville, Fort Smith, Harrison, Hot Springs, Jacksonville, Jonesboro, Osceola, Paragould, Pine Bluff, Prescott, Rogers, Russellville, Siloam Springs, Springdale, and Walnut Ridge, Ark.; Ada, Ardmore, Bartlesville, Enid, Muskogee, Sand Springs, and Tulsa, Okla. RESTRICTION: Restricted at the named points and off-route points in (1) through (5) above to the transportation of traffic moving from, to, or through Kansas City, Kans.-Mo., and further restricted at the named points and off-route points in (6), (7) and (8) above to the transportation of traffic moving from, to, or through St. Louis, Mo.

By way of clarification, applicant informed the Commission that the requested regular route authority will not be tacked with its irregular route authority on sheet 8 of MC-35628 (Sub-No. 302) authorizing operations between points in part C of Sub-No. 302 on the one hand, and, on the other, points in Iowa, Illinois, Arkansas, Oklahoma, and Kansas.

Supreme Court, U. S.
FILED
MAY 19 1978
MICHAEL RODAK, JR., CLERK

No. 77-1372

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERSTATE MOTOR FREIGHT SYSTEM, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On January 15, 1973 petitioner, a common carrier, sought permission from the Interstate Commerce Commission to convert a portion of its existing irregular-route operating authority in Arkansas, Missouri, and Oklahoma to regular-route authority[1] (Pet. App. A-10). After a hearing, the Commission denied the application on the basis of the Administrative Law Judge's findings that petitioner had deliberately used its irregular-route

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[1]Regular-route authority permits operations between specific points over specific routes. Irregular-route permits operations between all points within a territory, generally over unspecified routes. See 49 U.S.C. 303(a)(14), 308(a). See also *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, affirmed *sub nom. Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 116 (S.D. Iowa), affirmed *per curiam*, 335 U.S. 875.

authority to perform regular-route service by unlawfully encouraging and promoting operations that it could not legally perform (Pet. App. A-7, A-37 to A-44).

The court of appeals affirmed (Pet. App. A-1 to A-4). It concluded that "deliberate or intentional transformation [of irregular-route authority into regular-route operation] is an established ground for denial of a conversion application" and that "the Commission could properly infer from the facts of this case that [petitioner] deliberately or intentionally transformed the service in question into regular route operations" (Pet. App. A-4).

The decision of the court of appeals is correct, and further review is not warranted.

There is no basis for petitioner's claim (Pet. 7) that the Commission's decision was an unexplained departure from established Commission policy of "granting applications of the type denied."[2] As the court of appeals correctly determined, the Commission has long recognized and enforced the distinction between regular and irregular route authority and "has consistently stated that it will not sanction conversion from irregular to regular route authority where the character of the service has been intentionally transformed by the carrier" (Pet. App. A-3 and n. 2).[3]

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[2]Petitioner relied in the court of appeals on *Hart Motor Express, Inc.* v. *Midwest Motor Express, Inc.*, 92 M.C.C. 558, but the court of appeals found the case to be distinguishable (Pet. App. A-4 and n. 3). Petitioner does not now rely on *Hart* or on any other particular case for the proposition that the Commission has allowed other carriers identically situated to convert to regular route authority.

[3]Whether regular or irregular-route authority is more desirable to a carrier depends on that carrier's particular circumstances. Each type of authority has limitations and authorizations not applicable to the other. The Commission's decision to grant one type of authority rather than the other depends on its assessment of the public convenience and necessity. In ruling on an application to change the type of authority, it is clearly appropriate for the Commission to consider whether the carrier has deliberately by-passed the regulatory procedures by intentionally changing the character of its service from its authorized service to one that has not been authorized.

Petitioner also asserts that its actions were "unavoidable" rather than "deliberate" (Pet. 8). But the Administrative Law Judge thoroughly considered the circumstances surrounding petitioner's acquisition and operation of irregular-route authority (Pet. App. A-35 to A-40), and petitioner does not challenge any of the Judge's findings of fact.[4] Moreover, the court of appeals found that the record contains substantial evidence to support the Commission's finding that petitioner's transformation of the character of its service was deliberate (Pet. App. A-4), and petitioner has not shown that the court of appeals "misapprehended or grossly misapplied" the substantial evidence standard. *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 330.

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[4]As the Administrative Law Judge's decision indicates (Pet. App. A-37), one of the many criteria the Commission has used to distinguish regular from irregular-route service is the character of the cargo carried. Less-than-truckload (LTL) cargo is more characteristic of regular-route service, and active solicitation of such cargo by irregular-route carriers is one indication of deliberate conversion to regular-route service. Petitioner appears to admit (Pet. 7-8) that it deliberately solicited and developed such traffic, but erroneously claims that it did so at the Commission's encouragement. The fact that the Commission has required irregular-route carriers to have the capacity to handle LTL as well as truckload traffic—a capacity petitioner's predecessor lacked—could not reasonably have been viewed as abrogating the Commission's use of overall traffic characteristics as one index of the type of service rendered. See *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455, 492, affirmed *sum nom. Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D. D.C.) ("[This decision] would in no way relieve [irregular-route carriers] from maintaining their essential characteristics as irregular route carriers.") Moreover, the Commission relied on numerous other criteria in determining that petitioner had deliberately converted to regular service. See Pet. App. A-37 to A-42.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1978.

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